86-7164

No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WILLIAM STEWART McDOWELL,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DAVID K. FRANK
CLIFFORD R. CLOUD & ASSOCIATES
8 East Broad Street
Suite 1400
Columbus, Ohio 43215
614-228-8787

Counsel for Petitioner

June 24, 1987

Supreme Court U.S.
FILED
JUN 26
JOSEPH F. SPANIOL, JR.
Clerk

QUESTIONS PRESENTED FOR REVIEW

1. Is a "prophylactic warning and inquiry" designed to assure that a defendant seeking to represent himself in the trial of a felony case is "aware of the dangers and disadvantages of self-representation" (such as the inquiry required prospectively by the Sixth Circuit under its supervisory powers as a result of the petitioner's case below) mandatory under the Sixth Amendment and Faretta v. California, 422 U.S. 806 (1975) and a prerequisite to a proper finding that such a defendant has knowingly and intelligently waived his right to the effective assistance of counsel?

2. Must a trial court in the exercise of its protecting duty recognized in Westbrook v. Arizona, 384 U.S. 150 (1966) and before allowing a criminal defendant to represent himself at trial in a felony case, conduct a hearing or penetrating and comprehensive examination to determine whether the defendant possesses the competence necessary to waive his Sixth Amendment right to the effective assistance of counsel or to conduct his own defense?

3. Is a criminal defendant's purported waiver of his Sixth Amendment right to counsel constitutionally valid where: (a) the trial court fails to conduct an inquiry into the defendant's competence; (b) the trial court fails to inquire into whether the defendant is aware of the dangers and disadvantages of self-representation or to warn the defendant of such dangers; (c) the trial court fails to inquire into the defendant's reasons for wanting to proceed pro se; (d) the defendant is not given and does not sign any written waiver form, and; (e) the trial court does not make an affirmative finding on the record that the waiver is competently and intelligently made?

4. Where it becomes apparent to a trial court during a felony jury trial in which the defendant is proceeding pro se that due to his lack of capability to represent himself he will not receive a fair trial, and where the defendant admits that he is not capable of defending himself at trial, does the court commit plain error when it fails to either declare a mistrial sua sponte, or terminate the defendant's self-representation?

PARTIES TO THE PROCEEDING BELOW

There are no parties to this proceeding other than those listed in the caption.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 1

PARTIES TO THE PROCEEDING BELOW ii

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION OF THIS COURT 1

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

1. Statement of Facts. 3

2. The Judgment of The District Court. 6

3. The Decision Of The Sixth Circuit 6

   a. The Faretta hearing issue 7

   b. The competency issue 8

   c. The termination of self-representation issue . 9

IMPORTANT REASONS FOR GRANTING THE WRIT 10

I. The Questions Presented Are Of Substantial National Importance To The Uniform Administration of Justice. 10

II. The Decision Of The Sixth Circuit Directly Conflicts With And Misconstrues A Decision Of This Court. 12

III. Discordant Views Exist Between The Circuits With Respect To The Procedure Required Before Accepting A Criminal Defendant's Waiver Of The Right To Counsel And Permitting Him To Proceed Pro Se. 14

CONCLUSION 17

APPENDICES

APPENDIX A - Opinion of the United States Court of Appeals for the Sixth Circuit (March 16, 1987). 1a

APPENDIX B - Order of the United States Court of Appeals for the Sixth Circuit denying petition for rehearing (April 27, 1987) 17a

APPENDIX C - Judgment and Commitment Order of the United States District Court for the Eastern District of Michigan, Southern Division (March 19, 1986). . . . 18a

Page

APPENDIX D - Judgment Entry of the United States Court of Appeals for the Sixth Circuit (March 16, 1987). . . 19a

APPENDIX E - Excerpts From Transcript of October 23, 1985 Motions Hearing. . . . 20a

TABLE OF AUTHORITIES

Cases: **Page**

Adams v. United States ex rel. McCann,
317 U.S. 269 (1942) 7, 15

Annas v. State,
726 P.2d 552 (Alaska App. 1986). 8

Argersinger v. Hamlin,
407 U.S. 25 (1972) 7

Brewer v. Williams,
430 U.S. 387 (1977). 10

Carnley v. Cochran,
369 U.S. 506 (1962). 10

Chapman v. United States,
553 F.2d 886 (5th Cir. 1977) 15

City of Bellevue v. Acrey,
691 P.2d 957 (Wash. 1984) 16

Commonwealth v. Tyler,
360 A.2d 617 (Pa. 1976) 16

Dorman v. Wainwright,
798 F.2d 1358 (11th Cir. 1986) 15

Edwards v. Arizona,
451 U.S. 477 (1981) 10

Faretta v. California,
422 U.S. 806 (1975). . . . . .i, 7, 10, 12, 13

Fitzpatrick v. Wainwright,
800 F.2d 1057 (11th Cir. 1986) 12

Hance v. Zant,
696 F.2d 940 (11th Cir.)
cert. denied, 463 U.S.___,
103 S.Ct. 3544 (1983) 15

King v. People,
728 P.2d 1264 (Colo. 1986) 14

James v. State,
730 P.2d 811 (Alaska App. 1987). 16

Johnson v. Zerbst,
304 U.S. 458 (1938) 7, 10, 13

Lakeside v. Oregon,
435 U.S. 333 (1978) 10

Maine v. Moulton,
474 U.S.___, 106 S.Ct. 477 (1985) 10

Cases: **Page**

Michigan v. Jackson,
475 U.S.___, 106 S.Ct. 1404 (1986) 10

Moran v. Burbine,
475 U.S.___, 106 S.Ct. 1135 (1986) 10

Piankhy v. Cuyler,
103 P.2d 728 (3d Cir. 1983). 16

Pickens v. State,
292 N.W.2d 601 (Wis. 1980) 8, 9

Raulerson v. Wainwright,
469 U.S. 966 (1984). 12

Saunders v. State,
721 S.W.2d 359 (Tex. App. 1985). 11

State v. Bauer,
245 N.W.2d 848 (Minn. 1976) 8

State v. Christensen,
698 P.2d 1069 (Wash. App. 1985). 14

State v. Kolocotronis,
436 P.2d 774 (Wash. 1968). 8

United States v. Bailey,
675 F.2d 1292 (D.C. Cir. 1982) 14, 16

United States v. Chaney,
662 F.2d 1148 (5th Cir., Unit B 1981). . . . 15

United States v. Edwards,
716 F.2d 822 (11th Cir. 1983). 15

United States v. Hafen,
726 F.2d 21 (1st Cir), cert. denied,
466 U.S. 962 (1984). 16

United States v. Harrison,
451 F.2d 1013 (2d Cir. 1971) (per curiam). . 16

United States v. Kimmel,
672 F.2d 720 (9th Cir. 1982) 16, 17

United States v. Martin,
704 F.2d 267 (6th Cir. 1983) 8

United States v. McCaskill,
585 F.2d 189 (6th Cir. 1983) 12

United States v. McDowell,
814 F.2d 245 (6th Cir. 1987) 1, 7, 8, 9

United States v. Pilla,
550 F.2d 1085 (8th Cir.),
cert. denied, 432 U.S. 907 (1977). 16

Cases: **Page**

United States v. Trapnell,
638 F.2d 1016 (7th Cir. 1980). 16

United States v. Welty,
674 F.2d 185 (3d Cir. 1982) 14, 16

Von Moltke v. Gillies,
332 U.S. 708 (1968). 7, 10, 14

Westbrook v. Arizona,
384 U.S. 150 (1966). . . . . i, 8

Constitutional Provisions:

United States Constitution

Fifth Amendment 2, 11

Sixth Amendment 2, 11

Other Authorities:

ANNUAL REPORT OF THE DIRECTOR OF
THE UNITED STATES COURTS, 1986, p. 1 . . . . . 1, 2

1 BENCH BOOK FOR UNITED STATES DISTRICT
JUDGES 1.02-2 (3d ed. 1986) 8

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WILLIAM STEWART McDOWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, William Stewart McDowell, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on March 16, 1987.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit issued on March 16, 1987 is set forth as Appendix A (App. 1a-16a) and is reported at 814 F.2d 245.

The Court denied petitioner's petition for rehearing and suggestion for rehearing en banc on April 27, 1987. A copy of the unreported order is set forth in Appendix B (App. 17a-18a).

JURISDICTION

On March 19, 1986, the United States District Court for the Southern District of Michigan entered a judgment and commitment order sentencing the petitioner to be imprisoned for two consecutive five-year prison terms and to pay a committed fine of $10,000.00 following his trial on a charge of conspiracy to counterfeit in violation of 18 U.S.C. §371 and willful failure to appear, in violation of 18 U.S.C. §3146(a).

Upon petitioner's appeal, the Sixth Circuit, on March 16, 1987, affirmed the conviction and judgment of the District Court. The petitioner's petition for rehearing and suggestion for rehearing en banc, filed on March 27, 1987, was denied on April 27, 1987.

The jurisdiction of this Court to review the case and the opinion and judgment of the Sixth Circuit is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...nor be deprived of life, liberty, or property, without due process of law; ***

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence.

Title 28 U.S.C. §1254(1) states that:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> ***

STATEMENT OF THE CASE

1. Statement of Facts

This petition challenges the validity of the petitioner's purported waiver of his Sixth Amendment right to counsel and his subsequent conviction and imprisonment following a jury trial during which the petitioner represented himself.

On May 16, 1985, petitioner William McDowell and his wife, Revera Hendrix, were indicted in Michigan on one count of conspiracy to counterfeit in violation of 18 U.S.C. §371 and one count of willful failure to appear, in violation of 18 U.S.C. §3146(a)[1]. Petitioner McDowell was arraigned on June 18, 1985.

Subsequent to arraignment, the petitioner and his wife were jointly represented by retained Attorney Emory W. Clark who sought on August 7, 1985 and received on August 20, 1985 permission from the trial court, the United States District Court for the Eastern District of Michigan, Southern Division, to withdraw from the representation. Mr. Clark withdrew essentially because petitioner McDowell could no longer afford the services of counsel and because Mr. Clark believed that he could not fairly represent both defendants.

Following the withdrawal of Mr. Clark and in view of the petitioner's indigency, the trial court appointed Attorney Dan Bremer to represent him, noting on August 20, 1985:

> THE COURT: All right, then I'll appoint Mr. Dan Bremer on behalf of Mr. McDowell.
>
> ***
>
> If Mr. McDowell chooses not to have Mr. Bremer represent him, and wants to represent himself, he can communicate that to me through Mr. Bremer. And we'll proceed.

Because the trial was then scheduled to proceed on September 3, 1985 and Attorney Bremer felt that in the absence of a continuance he would need additional time to prepare, he

[1] The indictment originally contained a third count, charging a violation of 18 U.S.C. §1014. This count was subsequently dismissed by the government.

withdrew on August 26, 1985. The court then appointed Attorney Charles Grossman to represent Mr. McDowell by order dated August 30, 1985.

Less than two months later, on October 23, 1985, the following exchange took place between the trial court, Attorney Grossman and Assistant U.S. Attorney Robert Haviland, the government prosecutor (App. 20a-22a):

> THE COURT: Anything further, Mr. Grossman?
>
> MR. GROSSMAN: Yes, I've got a matter. I want to put on the record, Mr. McDowell has been somewhat ambivalent about whether or not he would like to exercise his statutory right and proceed In propria. When I've talked to him about it, he would only want to do that as long as I could continue as advisory counsel. I have explained to him that he doesn't have an absolute right but that's strongly encouraged by the court and in my experience that you probably would have me continue in any event as advisory counsel.
>
> Further, I would not make that motion unless to waive his right to counsel, in essence, or to exercise his statutory right to proceed on his own, unless I had it designated in writing from him or unless he wanted to state that on the record. And today I think he's willing to indicate which way he would like to proceed on the case, whether he wants to proceed on the case, whether he wants to proceed as his own counsel with me as advisory counsel or wants me to continue on as counsel.
>
> THE COURT: Well, let me say this so that there would be no mistake about it. I would, unless given some reason otherwise, would continue to have you appointed as stand-by or consulting counsel. And I would require any motion or conduct of Mr. McDowell to be discussed with you prior to him doing so. In any event, I will tell you, Mr. McDowell, that you have not a statutory right, but as I understand it, a constitutional right to represent yourself. You also have the constitutional right to be represented by a lawyer, and you also have the right to have counsel appointed for you as we have in the event you are indigent. Do you understand those rights?
>
> DEFENDANT MCDOWELL: Yeah.
>
> THE COURT: Okay. Have you made a decision as to what you wish to do in this case?
>
> DEFENDANT MCDOWELL: Represent myself with his assistance, if you can do that?

> THE COURT: All right, you understand that you will not be able to present something to me without going through him first? That's what I said to you a few moments ago, that if he's there as your counsel to consult, then you must consult with him before you present something to me. That's so that he can advise you as to its legality, its the appropriate form and that it's the appropriate time and the appropriate method of presenting it to me. And also he can at the same time advise you as to its likelihood of success or failure. Do you understand that, Mr. McDowell?
>
> DEFENDANT MCDOWELL: Uh-huh, yes.
>
> THE COURT: Any reason why I should not grant Mr. McDowell's request in this case in this fashion, Mr. Haviland?
>
> MR. HAVILAND: No, your honor.
>
> THE COURT: All right, then you may represnt yourself subject to Mr. Grossman remaining your advisory counsel and subject to the restriction that I have indicated, that you must consult with him before submitting anything to me.
>
> [Emphasis added]

At this October 23rd session, prior to accepting Mr. McDowell's purported waiver of his right to the effective assistance of counsel, the trial court: (a) did not conduct a Faretta hearing or an inquiry into the petitioner's competence to waive his right to counsel; (b) did not discuss with him or determine whether he was aware of the full dangers and disadvantages of self-representation or warn him of such dangers; (c) did not inquire into his reasons for wanting to proceed pro se; (d) did not determine if he had an awareness of the rules and procedures governing the conduct of a trial; (e) did not determine whether the petitioner had the competency or capacity necessary to conduct his own defense; (f) did not give the petitioner a written waiver form to read or execute, and (g) did not make an affirmative finding on the record that the waiver was competently and intelligently made.

The trial commenced on December 9, 1985, with the petitioner proceeding pro se and with Attorney Grossman serving as "stand by" counsel. Mr. McDowell had never previously

represented himself in a trial and had no formal training in the law.

Soon after the trial began, the court recognized, on the record, that McDowell was "not capable" of representing himself, a fact admitted by the petitioner. The court further recognized that the petitioner was "not going to get a fair trial", stating:

> THE COURT: ...I wish he [McDowell] would get a lawyer who would control these proceedings and give him a fair trial. He's not going to get a fair trial the way he's conducting himself...

The court, however, did not declare a mistrial nor did it direct Mr. Grossman to step in and "take over" the defense function.

The trial court was also aware that Mr. McDowell had vehemently complained of serious problems which hampered his ability to prepare for trial, including his lack of eye glasses needed to read documents and poor conditions at the Shiawassee County Jail in which he was incarcerated awaiting trial. The jail conditions were so bad that Mr. McDowell actually asked to be put "in maximum security" for "an opportunity to be alone" to "prepare for trial".

Despite these circumstances, the court did not sua sponte declare a mistrial, nor terminate Mr. McDowell's self-representation, and the jury returned a verdict of guilty on both charges.

2. The Judgment Of The District Court

On March 19, 1986, the District Court entered a judgment and commitment order (App. 18a) which sentenced the petitioner to be imprisoned for two consecutive five-year prison terms under 18 U.S.C. §4205(a), and to pay a committed fine totaling $10,000.00 ($5,000.00 on each count).

3. The Decision Of The Sixth Circuit

The petitioner, thereafter, took a timely appeal to the United States Court of Appeals for the Sixth Circuit which appointed Attorney David K. Frank to represent Mr. McDowell in

his appeal. The petitioner challenged the validity of his conviction and imprisonment on several constitutional grounds.

a. The Faretta Hearing Issue

The petitioner's first constitutional challenge argued that the conviction and imposition of the sentence in question contravened the Sixth Amendment because his purported waiver of his right to the effective assistance of counsel was not made competently, knowingly and intelligently or with a full appreciation of the inherent dangers and disadvantages of self-representation and was, therefore, invalid. The petitioner, relying on this Court's pronouncements in Faretta v. California, 422 U.S. 806 (1975), Argersinger v. Hamlin, 407 U.S. 25, 37 (1972), Von Moltke v. Gillies, 332 U.S. 708 (1968), and Johnson v. Zerbst, 304 U.S. 458, 463 (1938), argued that the Sixth Amendment stood as a jurisdictional bar to his conviction and sentence since the trial court not only failed to advise the petitioner of the dangers and disadvantages of self-representation, but also failed to conduct an inquiry to insure that the petitioner's ambivalent decision to represent himself was competently and intelligently made. The petitioner argued that this failure was determinative of the issue, particularly since this Court in Faretta v. California, supra, at 422 U.S. 835, clearly stated:

> Although a defendant need not himself have the skill and experience of a lawyer in order to competently and intelligently choose self-representation, **he should be made aware of the dangers and disadvantages of self-representation**, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." Adams v. United States ex rel. McCann, 317 U.S. at 279...
>
> [Emphasis added]

The Sixth Circuit acknowledged that no such warning and inquiry was made by the trial court (App. 5a) but, nevertheless, concluded that "McDowell understood the dangers and disadvantages of self-representation at the time he made his

choice" (App. 8a). Unfortunately for Mr. McDowell, however, the Court of Appeals invoked its supervisory powers only prospectively to require district judges to use a "model inquiry" set forth in 1 BENCH BOOK FOR UNITED STATES DISTRICT JUDGES 1.02-2 (3d ed. 1986) in all cases in the future where an accused seeks to waive representation by counsel and proceed pro se, noting:

> *** In the future, whenever a federal district judge in this circuit is faced with an accused who wishes to represent himself in criminal proceedings, the model inquiry or one covering the same substantive points along with an express finding that the accused has made a knowing and voluntary waiver of counsel, shall be made on the record prior to allowing the accused to represent himself. (App. 9a)

b. The Competency Issue

The petitioner also urged that his conviction and sentence be set aside because the trial court had failed to determine or even inquire into his mental competency to waive his Sixth Amendment right to the effective assistance of counsel or to conduct his own defense. He relied heavily upon the reasoning of the Supreme Court of Wisconsin in Pickens v. State, 292 N.W.2d 601, 610 (Wis. 1980), as well as upon Annas v. State, 726 P.2d 552, 556-557 (Alaska App. 1986), United States v. Martin, 704 F.2d 267, 272 (6th Cir. 1983), State v. Bauer, 245 N.W.2d 848 (Minn. 1976), State v. Kolocotrinis, 436 P.2d 774 (Wash. 1968), and Westbrook v. Arizona, 384 U.S. 150 (1966). The petitioner also relied upon indications in the record that "something was amiss" and that he was suffering from a severe mental disorder known as "paranoia" characterized by delusions which could have "closed his eyes" or blinded him to the dangers and disadvantages of self-representation, even if he had been made aware of them by the trial court.

The Court of Appeals, while acknowledging that the degree of competency required to waive counsel is higher than the degree of competency required to stand trial, specifically

rejected the reasoning of the Wisconsin Supreme Court in the Pickens case relied upon by the petitioner and concluded that the petitioner was competent to waive his Sixth Amendment right and proceed pro se (App. 9a).

c. The Termination Of Self-Representation Issue

Finally, the petitioner argued on appeal that the trial court's failure to terminate his self-representation and direct his stand-by counsel to take over or, alternatively, to sua sponte declare a mistrial when the trial court recognized, on the record, that the petitioner was "not capable" of defending himself and that he was "not going to get a fair trial the way he's conducting himself", denied him a fair trial and violated the Due Process Clause of the Fifth Amendment. The Court of Appeals, however, found no violation and held that the district court "accorded McDowell his full constitutional rights at trial" (App. 11a).

On April 27, 1987, the Court of Appeals denied petitioner's petition for rehearing and suggestion for rehearing en banc. This petition followed.

IMPORTANT REASONS FOR GRANTING THE WRIT

I.

The Questions Presented Are Of Substantial National Importance To The Uniform Administration Of Justice

This Court has long recognized that the Sixth Amendment right to the effective assistance of counsel is perhaps the most important of all rights a criminal defendant has because it "safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding". Maine v. Moulton, 474 U.S. ___, 106 S.Ct. 477, 483 (1985); Lakeside v. Oregon, 435 U.S. 341 (1978). As a consequence, the Court has historically been scrupulous in requiring that a criminal defendant's waiver of that right be competently made "with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it". Moran v. Burbine, 475 U.S. ___, 106 S.Ct. 1404, 1409 (1986); Edwards v. Arizona, 451 U.S. 477, 482 (1981); Brewer v. Williams, 430 U.S. 387 (1977); Johnson v. Zerbst, supra, at 464; Von Moltke v. Gillies, supra, at 723-724.

It has also consistently required the courts to "indulge every reasonable presumption against waiver of fundamental constitutional rights". Michigan v. Jackson, 475 U.S. ___, 106 S.Ct. 1404, 1409 (1986); Carnley v. Cochran, 369 U.S. 506, 514 (1962).

In 1975, this Court in Faretta v. California, supra, held for the first time that a criminal defendant has a constitutional right to dispense with the assistance of counsel and to represent himself. In that case, Mr. Justice Blackmun joined by Chief Justice Burger and Mr. Justice Renquist, predicted in his dissenting opinion that "the right of self-representation constitutionalized today frequently will cause procedural confusion..." 422 U.S. at 846. He also predicted, at page 852, that:

> Many...[unanswered questions] such as the standards of waiver and the treatment of the

> pro se defendant, will haunt the trial of every defendant who elects to exercise his right to self-representation...

Twelve years after Faretta, those predictions have, unfortunately, proven accurate, and the recurring procedural difficulties spawned by the exercise of the right of self-representation have been confusing and exceedingly troublesome for the lower courts. See, e.g., Saunders v. State, 721 S.W.2d 359, 362 (Tex. App. 1985). As a consequence, even the various federal circuits have handled such issues differently, resulting in national non-uniformity in the administration of justice.

This case is an appropriate one to eliminate much of this procedural confusion because it squarely presents a number of important Sixth and Fifth Amendment questions in need of clarification:

--- Must a trial court advise a criminal defendant seeking to proceed pro se of the dangers and disadvantages of self-representation before accepting a purported waiver of the right to counsel?

--- Must a trial court conduct a hearing or penetrating examination to determine if a criminal defendant is competent to waive his right to counsel and proceed pro se before allowing him to represent himself?

--- Must a trial court terminate a criminal defendant's self-representation or declare a mistrial when the defendant admits that he is not capable of representing himself and it becomes apparent to the trial court that the defendant, as a consequence, will not receive a fair trial?

Each of these questions is substantial in its own right. Until answered by this Court, the "procedural problems"

predicted in Faretta will continue to plague our criminal justice system, and haunt the appellate courts[2]. Indeed, review is necessary to help resolve these troublesome and recurring problems and to provide additional guidance to the lower courts.

II.

The Decision Of The Sixth Circuit Directly Conflicts With And Misconstrues A Decision Of This Court.

In its decision below, the Sixth Circuit, citing its earlier per curiam opinion in United States v. McCaskill, 585 F.2d 189, 190 (6th Cir. 1983), stated that:

> There was...no occasion in Faretta to lay down detailed guidelines concerning what tests or lines of inquiry a trial judge is required to conduct in order to determine whether a defendant has "knowingly and intelligently" chosen to forego the benefits of counsel.

In Faretta, however, this Court mandated a colloquy/hearing in which a criminal defendant seeking to represent himself "should be made aware of the dangers and disadvantages of self-representation" 422 U.S. at 835. The fact that such a hearing is constitutionally required under Faretta was clarified by Mr. Justice Marshall in his dissent to the order denying a writ of certiorari in Raulerson v. Wainwright, 469 U.S. 966 (1984), at pages 966, 969-970:

> In Faretta v. California, 422 U.S. 806 (1975), this Court held that a defendant in a state criminal trial has a right under the Sixth and Fourteenth Amendments to proceed without counsel if he clearly and unequivocally asks to do so. In this case, the petitioner made a motion to represent himself in which he cited Faretta. According to Faretta, when such a motion is made, the court must assure that the petitioner understands the dangers of his decision, and that the decision is knowing and voluntary, and then rule on the motion.

[2] In 1986, a record number of 34,292 federal appeals were filed. ANNUAL REPORT OF THE DIRECTOR OF THE UNITED STATES COURTS, 1986 at page 1. Clarification of the issues presented would "decrease appellate litigation". See the analysis of Senior District Judge Atkins in Fitzpatrick v. Wainwright, 800 F.2d 1057, 1072 n. 12 (11th Cir. 1986).

***

> The exercise of the right recognized in Faretta entails a concomitant waiver of the right to counsel expressly guaranteed by the Sixth Amendment. Accordingly, we indicated in Faretta that defendants should be permitted to exercise their right of self-representation only if they execute a valid waiver of their right to counsel, which is to say, only if they "'knowingly and intelligently' forego [the] relinquished benefits" of counsel. 422 U.S., at 835 (citing Johnson v. Zerbst, 304 U.S. 458, 464-465 (1938)). Further, we held, judges are to assure that defendants are made aware of the "dangers and disadvantages of self-representation," 422 U.S., at 835, before permitting them to relinquish counsel.
>
> ***
>
> *** Accordingly, in Faretta we indicated that a defendant's clear and unequivocal assertion of a desire to represent himself must be followed by a hearing, in which he is "made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" Faretta, 422 U.S. at 835. A Faretta hearing offers a court ample opportunity to assure that a defendant understands and accepts the consequences of his decision, and to create a record to support its finding of a knowing waiver. As a result, once a defendant affirmatively states his desire to proceed pro se, a court should cease other business and make the required inquiry. It is through this hearing that the right to counsel is protected.
>
> The foregoing makes clear, then, that if a trial court judge holds a Faretta hearing when the accused clearly asserts his desire to proceed pro se, the result will not do harm to the right to counsel. At the same time, the failure to hold a Faretta inquiry at this time will do injury to the right recognized in Faretta. ***
>
> *** [S]ufficient protection of the Faretta right may only be achieved if the trial court is required to hold a hearing when the right is asserted. [Emphasis added]

The petitioner submits that the Sixth Circuit's decision below, which found a valid waiver in the absence of such a hearing, and despite the fact that the trial court did not advise the petitioner of the "dangers and disadvantages of self-representation", misconstrued and conflicts with this Court's

decision in Faretta. It also conflicts with this Court's earlier pronouncement in Von Moltke v. Gillies, supra, concerning the trial court's important responsibility to determine that a criminal defendant's decision to waive his right to counsel is intentional and intelligently made (i.e., with an awareness of the dangers inherent in defending oneself). As noted in Von Moltke, to discharge this duty properly in light of the strong presumption against waiver of the right to counsel, "a judge must investigate as long and as thoroughly as the circumstances of the case before him demand..." 323 U.S. at 723. Also see King v. People, 728 P.2d 1264, 1268 (Colo. 1986).

III.

Discordant Views Exist Between The Circuits With Respect To The Procedure Required Before Accepting A Criminal Defendant's Waiver Of The Right To Counsel And Permitting Him To Proceed Pro Se.

Contrary to the Sixth Circuit's view of Faretta, other federal courts have embraced the reasoning of Mr. Justice Marshall, outlined above, recognizing that the Faretta inquiry is an important safeguard which protects a defendant by educating him and also insuring that his decision is "voluntary and intelligent".

As a Washington state appellate court stated in State v. Christensen, 698 P.2d 1069, 1071 (Wash. App. 1985):

> The federal courts interpret Faretta in two ways. A number of the circuits require a colloquy on the record between the judge and defendant whereby the judge informs the defendant of the risks of self-representation. The colloquy must show that the trial judge advised defendant in unequivocal terms of the technical problems he may encounter in self-representation, United States v. Welty, 674 F.2d 185 (3d Cir. 1982), or that the judge has, in some fashion, explained and explored the risks of self-representation with the defendant. United States v. Donahue, 560 F.2d 1039 (1st Cir. 1977); United States v. Aponte, 591 F.2d 1247 (9th Cir. 1978); United States ex rel. Tonaldi v. Elrod, 716 F.2d 431 (7th Cir. 1983); United States v. Bailey, 675 F.2d 1292 (D.C. Cir. 1982).

The Eleventh Circuit noted in United States v. Edwards, 716 F.2d 822 (11th Cir. 1983) at page 824, that:

> *** Because assertion of the right of self-representation constitutes a waiver of the right to counsel, as well as a relinquishment of the important benefits associated with that right, the trial judge must conduct a hearing to ensure that the accused understands the dangers and disadvantages of proceeding pro se. Hance v. Zant, 696 F.2d 940, 949 (11th Cir. 1983). The trial judge must determine that the defendant "knows what he is doing and [that] his choice is made with open eyes." Faretta, supra 422 U.S. at 835, 95 S.Ct. at 2541, quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 242, 87 L.Ed. 268 (1942).

Subsequently, Senior Circuit Judge Garza noted for the Court in Dorman v. Wainwright, 798 F.2d 1358 (11th Cir. 1986), at page 1366:

> Insofar as the desire to proceed pro se is concerned, petitioner must do no more than state his request, either orally or in writing, unambiguously to the court so that no reasonable person can say that the request was not made. In this Circuit, the court must then conduct a hearing on the waiver of the right to counsel to determine whether the accused understands the risks of proceeding pro se. *** [Emphasis added]

The Fifth Circuit, in United States v. Chaney, 662 F.2d 1148, 1152 (5th Cir., Unit B. 1981), also recognized that:

> *** [B]ecause an accused who manages his own defense relinquishes many of the traditional benefits associated with the right to counsel, a trial judge must conduct a waiver hearing to make sure that the accused understands the risks of proceeding pro se and that he "knowingly and intelligently waives the right to counsel" before permitting the accused to proceed personally. Id. at 835, 95 S.Ct. at 2541; Chapman v. United States, 553 F.2d 886, 889 (5th Cir. 1977).

As noted below by the Sixth Circuit, however, (App. 7a), other circuits have adopted a "non-formalistic approach to determining sufficiency of the waiver" and do not require "a deliberate and searching inquiry" or hearing of the kind

mandated by Faretta[3]. See, e.g., United States v. Hafen, 726 F.2d 21, 25-26 (1st Cir.), cert. denied, 466 U.S. 962 (1984); United States v. Kimmel, 672 F.2d 720, 721-722 (9th Cir. 1982); United States v. Trapnell, 638 F.2d 824, 828 (2d Cir. 1980); United States v. Pilla, 550 F.2d 1085, 1093 (8th Cir.), cert. denied, 432 U.S. 907 (1977).

The D.C. Circuit has taken an entirely different approach. In United States v. Bailey, 675 F.2d 1292, 1297 (D.C. Cir. 1982), the court of appeals exercised its supervisory powers to spell out the procedure to be followed whenever an accused seeks to waive representation by counsel and proceed pro se.

The Sixth Circuit's decision below also conflicts with the view of several state supreme courts regarding the "penetrating and comprehensive examination" required by Von Moltke or the inquiry/hearing required by Faretta. See, e.g. City of Bellevue v. Acrey, 691 P.2d 957, 961 (Wash. 1984); Commonwealth v. Tyler, 360 A.2d 617 (Pa. 1976). Another example is that of Alaska. There, as noted in James v. State, 730 P.2d 811, 815 (Alaska App. 1987):

> The Alaska Supreme Court, in keeping with standard 6-3.6 of the ABA Standards for Criminal Justice, has required trial courts to assure by an on-the-record inquiry that the accused understands the benefits of counsel and the dangers of self-representation before proceeding unrepresented to trial.

The Sixth Circuit's decision in the instant case, in upholding the trial court, completely disregards the language of Faretta requiring a defendant to be "made aware of the dangers and disadvantages of self-representation" -- a disregard which apparently has also been widespread among district courts. As Circuit Judge Reinhardt noted in his opinion in United States v.

[3] The Third Circuit, however, has reversed a conviction because the district court did not make a "searching inquiry" on the record. See United States v. Welty, 674 F.2d 185, 192 (3d Cir. 1982) and Piankhy v. Cuyler, 703 F.2d 728, 730-731 (3d Cir. 1983), (granting writ of habeas corpus). Also see United States v. Harrison, 451 F.2d 1013 (2d Cir. 1971) (per curiam).

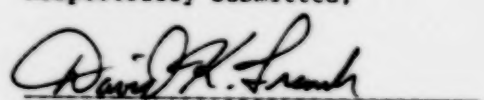
Kimmel, supra, at page 731, concurring in part and dissenting in part:

> Despite our previous warnings, district courts continue to accept waivers of counsel without expressly advising the defendant of the risks and consequences of their proposed action or otherwise attempting to determine on the record if the defendant has made a knowing and intelligent waiver of that right. ***

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



DAVID K. FRANK
CLIFFORD R. CLOUD & ASSOCIATES
8 East Broad Street
Suite 1400
Columbus, Ohio 43215
614-228-8787

Counsel for Petitioner

June 24, 1987

APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See. Sixth Circuit Rule 24

No. 86-1276

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

v.

WILLIAM STEWART MCDOWELL,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed March 16, 1987

Before: ENGEL and JONES, Circuit Judges; and EDWARDS, Senior Circuit Judge.

JONES, Circuit Judge, delivered the opinion of the court, in which EDWARDS, Senior Circuit Judge, joined. ENGEL, Circuit Judge, (pp. 15-16) delivered a separate concurring opinion.

JONES, Circuit Judge. Defendant William Stewart McDowell appeals from his jury conviction on one count of conspiracy to counterfeit in violation of 18 U.S.C. § 371 (1982), and one count of willful failure to appear (bond jumping) in violation of 18 U.S.C. §§ 3146(a) and 3150 (1982).[1] The evidence

[1]McDowell's release on bond pursuant to § 3146(a) and his willful failure to appear in violation of § 3150 both occurred prior to the enact-

against McDowell presented at trial was overwhelming. He now challenges his conviction on various sixth amendment grounds. After reviewing the entire record, we find no constitutional violation and, therefore, affirm.

I.

On June 24, 1983, McDowell and his wife, Revera Hendrix, were arrested by federal agents in a counterfeiting "sting." That same day, McDowell was visited at the police station by his retained counsel, Don Poniatowski. McDowell and Hendrix were arraigned before a federal magistrate on June 26, 1983. At that time, Poniatowski's law partner, John Nowak, entered an appearance on McDowell's behalf. McDowell and Hendrix were released on bond and promptly fled the country. On April 25, 1985, McDowell and Hendrix were arrested by Canadian authorities in Alberta. They were returned to Michigan where they were indicted on the instant charges.

At his subsequent arraignment and detention hearing, McDowell was represented by another retained counsel, Michael Osaer. Nevertheless, over the magistrate's advice, McDowell made his own motion to dismiss the indictment. Two days later, on June 20, 1985, Nowak reappeared on McDowell's behalf. On July 1, Nowak withdrew and Emory Clark appeared as retained counsel for McDowell.

A pretrial motions hearing was held by the district judge on August 20, 1985. Mr. Clark was allowed to withdraw at that time because McDowell was no longer able to pay for his services. The district judge indicated that he would

---

ment of the Criminal Justice Act Revision of 1984. Section 203(a) of the 1984 Act repealed both statutes and added new, recodified sections to title 18 of the United States Code. *See* 18 U.S.C. §§ 3142 and 3146(a)(1) (Supp. III 1985). McDowell was tried and convicted pursuant to the pre-1984 statute.

appoint counsel to represent McDowell—a Mr. Bremer. Despite Bremer's appointment, McDowell made repeated attempts to act as his own attorney at that hearing. It was also revealed at the August 20 hearing that McDowell had retained at least four other attorneys in the United States and Canada in an effort to recover money and property seized by the Canadian authorities.

On August 26, 1985, Bremer stated to the court that he could not be prepared for a September 3 trial date. McDowell refused to agree to an adjournment of the trial date and indicated that he was prepared to represent himself on that date: "I myself am ready [for trial] if I could have the rights granted to me . . . ." Rather than have McDowell proceed *pro se*, the district judge allowed Bremer to withdraw and appointed yet another counsel—Charles Grossman. Grossman convinced McDowell that an adjournment of the trial date was in his best interests, and the trial was postponed until a future date not earlier than November 1, 1985.

The final pretrial hearing was held on October 23, 1985, at which time McDowell was still represented by Grossman. McDowell indicated that he was satisfied with Grossman's services up to that point. Nevertheless, Grossman stated to the court that his client had finally come to a decision as to whether he wanted to be represented by appointed counsel or to proceed *pro se*. After the court indicated its willingness to continue the appointment of Grossman as advisory counsel in the event that McDowell exercised his constitutional rights to self-representation, the following colloquy took place:

> THE COURT: Okay. Have you made a decision as to what you wish to do in this case?
>
> DEFENDANT McDOWELL: Represent myself with his [Grossman's] assistance, if you can do that?
>
> THE COURT: All right, you understand that you will not be able to present something to me without

> going through him first? That's what I said to you a few moments ago, that if he's there as your counsel to consult, then you must consult with him before you present something to me. That's so that he can advise you as to its legality, it's the appropriate form and that it's the appropriate time and the appropriate method of presenting it to me. And also he can at that time advise you as its likelihood of success or failure. Do you understand that, Mr. McDowell?
>
> DEFENDANT McDOWELL: Uh-huh, yes.
>
> THE COURT: Any reason why I should not grant Mr. McDowell's request in this case in this fashion, Mr. Haviland [Asst. U.S. Att'y]?
>
> MR. HAVILAND: No, your Honor.
>
> THE COURT: All right, then you may represent yourself subject to Mr. Grossman remaining your advisory counsel and subject to the restriction that I have indicated, that you must consult with him before submitting anything to me.

App. 54-55. Throughout the trial, the district judge repeatedly had to remind McDowell of the condition that he check with Grossman before proceeding. The court also repeatedly indicated to McDowell, and to the other parties to the trial in McDowell's presence, that he thought McDowell was making a mistake and was "in over his head."

In preparation for trial, McDowell demanded, received and read the transcripts of the grand jury testimony of witnesses against him. He used this information in his cross-examination of government witnesses (he conducted cross-examination of each and every witness). He also called witnesses in his defense and testified himself with Grossman conducting the examination.

II.

All of McDowell's arguments to this court revolve around whether he knowingly and intelligently waived his sixth

amendment right to counsel while asserting his alternative right to self-representation. In particular, he argues that the conviction should be reversed because the district court failed to make explicit warnings and determinations on the record relative to the waiver of counsel. He also contends that the district court erred in failing to inquire into and determine his competence to conduct his own defense. Finally, McDowell maintains that it was plain error not to declare a mistrial *sua sponte* when it became apparent that he was not representing himself effectively. We address these contentions *seriatim*.

A.

The first issue presents the question whether the district court was required to conduct a lengthy and searching inquiry on the record to determine whether McDowell understood his right to be represented by counsel, the gravity of his decision to represent himself, and the obstacles that he would face. McDowell's counsel urges this court to reverse the instant conviction and create a prophylactic warning and inquiry to be conveyed to every criminal defendant wishing to assert his constitutional right to self-representation. Failure to make this warning and inquiry, or its functional equivalent, on the record and prior to the waiver of counsel, would necessarily be reversible error. While there can be no question but that this appeal would have been precluded or at least expedited had such a formal colloquy been held, we are reluctant to reverse an otherwise valid conviction under these circumtances.

The legal standard is well-settled that an accused's waiver of his right to counsel must be knowingly and intelligently made. *See Carnley* v. *Cochran*, 369 U.S. 506, 513 (1962); *Von Moltke* v. *Gillies*, 332 U.S. 708, 727 (1948); *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 279 (1942); *Johnson* v. *Zerbst*, 304 U.S. 458, 468-69 (1938). The Supreme Court stated in *Carnley*:

> Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver.

369 U.S. at 516. Although the instant record does not speak very loudly on this issue, it cannot fairly be characterized as "silent." McDowell was clearly and repeatedly advised of his right to counsel, and his right to have counsel appointed if necessary, prior to his assertion of his right to self-representation.

Before 1975, constitutional determinations of the voluntariness of a waiver of counsel were motivated primarily by the need to protect accused persons from the dire consequences of rash gestures. In that year, however, the Supreme Court decided *Faretta v. California*, 422 U.S. 806 (1975), and accorded constitutional significance to the right to self-representation. There, the Court held that it was constitutional error to force a state-appointed public defender on an accused who wished to represent himself. Of course, the accused who is untrained in the law and represents himself still takes a grave risk, but the district judge who has to determine whether the waiver of the right to counsel is competently and intelligently made is now in a much more difficult position. An overprotective judge who refuses to allow a defendant to jeopardize his own defense may be reversed, *see id.*, and a judge who does not make a copious inquiry into the thought process of the accused (which may themselves be characterized as trial strategy) is subject to an appeal such as that presently before this court.

In *Faretta*, the Court touched on the problem of the competing interests:

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the

> traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."

422 U.S. at 835 (citations omitted). Since *Faretta*, a great many courts have addressed the question of the type of record necessary to establish that a defendant's waiver of counsel is knowing and intelligent. This circuit stated in *United States* v. *McCaskill*, 585 F.2d 189, 190 (6th Cir. 1978) (per curiam):

> There was thus no occasion in *Faretta* to lay down detailed guidelines concerning what tests or lines of inquiry a trial judge is required to conduct in order to determine whether a defendant has "knowingly and intelligently" chosen to forego the benefits of counsel. While a more satisfactory record would be before us had the district judge chosen to follow a line of inquiry akin to that mandated by Rule 11(c), Rules of Criminal Procedure, an examination of the entire record in the present case satisfies us that appellant was in fact aware of the dangers, waived his right to be represented by counsel, and chose to represent himself "with eyes open." It is further apparent that he fully understood his right to appointed counsel and the court's willingness to make such an appointment.

The majority of the other circuits that have addressed this problem have adopted a similar nonformalistic approach to determining sufficiency of the waiver from the record as a whole rather than requiring a deliberate and searching

inquiry. *See Richardson v. Lucas*, 741 F.2d 753, 756-57 (5th Cir. 1984); *United States v. Hafen*, 726 F.2d 21, 25-26 (1st Cir.), *cert. denied*, 466 U.S. 962 (1984); *United States v. Kimmel*, 672 F.2d 720, 721-22 (9th Cir. 1982); *United States v. Trapnell*, 638 F.2d 1016, 1029 (7th Cir. 1980); *United States v. Tompkins*, 623 F.2d 824, 828 (2d Cir. 1980); *United States v. Pilla*, 550 F.2d 1085, 1093 (8th Cir.), *cert. denied*, 432 U.S. 907 (1977). Many of these courts have indicated that a formal inquiry on the record would have been preferable. The D.C. Circuit affirmed the conviction of a defendant who waived his right to counsel without the benefit of a formal inquiry by the district court, but exercised its *supervisory powers* to require all D.C. district courts to make such inquiries in future cases. *See United States v. Bailey*, 675 F.2d 1292, 1297 (D.C. Cir.), *cert. denied*, 459 U.S. 853 (1982). To our knowledge, the only circuit that has actually reversed a conviction because the lower court did not make such a searching inquiry on the record is the Third Circuit in *United States v. Welty*, 674 F.2d 185, 192 (3d Cir. 1982). *Accord Plankey v. Cuyler*, 703 F.2d 728, 730-31 (3d Cir. 1983) (granting writ of habeas corpus).

We think it a fair reading of the record as a whole that McDowell understood the dangers and disadvantages of self-representation at the time he made his choice. It is clear that he was not a stranger to the courts, he knew he was entitled to counsel, and he was not faced with a situation of enduring representation by counsel he considered ineffective or being forced to proceed immediately on his own (as in many of the cases cited). We conclude from the record that McDowell elected to defend himself at trial with his "eyes open."

Nevertheless, in order to avoid future appeals of a similar nature, we follow the lead of the D.C. Circuit in *United States v. Bailey*, 675 F.2d at 1297, and invoke our supervisory powers to identify the nature of the inquiry to be made and the procedure to be followed henceforth in situations where an

accused seeks to waive representation by counsel and proceed *pro se*. A model inquiry for district judges is set forth in 1 *Bench Book for United States District Judges* 1.02-2 (3d ed. 1986). For convenience, it is reproduced in the appendix to this opinion. In the future, whenever a federal district judge in this circuit is faced with an accused who wishes to represent himself in criminal proceedings, the model inquiry or one covering the same substantive points along with an express finding that the accused has made a knowing and voluntary waiver of counsel, shall be made on the record prior to allowing the accused to represent himself.

B.

McDowell next contends that, assuming *arguendo* that the waiver of the right to counsel was knowing and voluntary, the district court erred in failing to determine whether he was competent to conduct his own defense. He relies primarily on the case of *Pickens v. State*, 96 Wis. 2d 549, 292 N.W.2d 601 (1980), in which the Supreme Court of Wisconsin held that in addition to the knowing and voluntary waiver, the trial court must also determine whether the accused "possesses the minimal competence necessary to conduct his own defense." *Id.* at 611. The *Pickens* court stated that in making this competency determination, the trial court should consider the accused's "education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury." *Id.*

We recognize that the degree of competency required to waive counsel is "vaguely higher" than the competency required to stand trial. *United States ex rel. Konigsberg v. Vincent*, 526 F.2d 131, 133 (2d Cir. 1975), *cert. denied*, 426 U.S. 937 (1976) (citing *Westbrook v. Arizona*, 384 U.S. 150 (1966) (per curiam)). We do not accept the reasoning of the Wisconsin Supreme Court, however, that the question of competency is determined separately from the question whether the

assertion of the right of self-representation was knowing and intelligent. It is clear that no degree of legal knowledge is required to knowingly and intelligently demand the right to represent oneself in a criminal proceeding. *Faretta*, 422 U.S. at 836. To suggest that an accused, who knows and appreciates what he is relinquishing and yet intelligently chooses to forego counsel and represent himself, must still have had some formal education or possess the ability to converse in English is, we think, to misunderstand the thrust of *Faretta* and the constitutional *right* it recognized. The *Faretta* Court assumed that the overwhelming majority of laymen who defend themselves in a criminal action will fare worse than those represented by skilled counsel. Nonetheless, just as it is the accused's right to plead guilty or *nolo contendere* to the charges against him, it is equally an accused's personal constitutional right to face the charges alone, either by standing mute and forcing the state to its proofs or by attempting to defend himself. The *only* condition on this right is that it be asserted by the accused with his "eyes open."

We are not called upon today to decide the hard case. Mr. McDowell had a high school education, was literate, was fully fluent in the English language, and had no apparent physical or psychological disabilities.[2] None of his many attorneys ever suggested that he was, in any sense, incompetent. To the extent that McDowell himself made comments during the course of trial suggesting that he may not have been "in his right mind," we understand these statements to be little more than tactical and colloquial pleas for sympathy.

---

[2]We note only in passing that a psychological impairment would go to the question of whether the waiver of counsel was knowing and intelligent. Any limitations due to physical or educational impairments that do not affect the ability of the accused to choose self-representation over counsel can probably be overcome, if necessary, through the use of stand-by counsel or interpreters. Such aids may be provided even over the objection of the accused. *See Faretta*, 422 U.S. at 834 n.46.

C.

McDowell's final argument is that the district court committed plain error in not declaring a mistrial *sua sponte* after it became apparent that he was not receiving a "fair trial." The only thing that was "unfair" about McDowell's trial was that he did not represent himself very well and he refused to make use of the stand-by counsel appointed by the court. However, as the Supreme Court stated in *Faretta*, "whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.' " *Id.* at 834 n.46. We think this logic applies equally to preclude the instant "fair trial" claim. The district court accorded McDowell his full constitutional rights at trial.

III.

In conclusion, after reviewing the record as a whole, we find that McDowell knowingly and intelligently chose to waive his right to counsel and to assert his corollary right to self-representation with his "eyes open." Accordingly, the judgment of conviction is **AFFIRMED**.

APPENDIX

Guideline For District Judges from 1 *Bench Book for United States District Judges* 1.02-2 to -5 (3d ed. 1986).

When a defendant states that he wishes to represent himself, you should . . . ask questions similar to the following:

(a) Have you ever studied law?

(b) Have you ever represented yourself or any other defendant in a criminal action?

(c) You realize, do you not, that you are charged with these crimes: (Here state the crimes with which the defendant is charged.)

(d) You realize, do you not, that if you are found guilty of the crime charged in Count I the court must impose an assessment of at least $50 ($25 if a misdemeanor) and could sentence you to as much as _____ years in prison and fine you as much as $_____?

(Then ask him a similar question with respect to each other crime with which he may be charged in the indictment or information.)

(e) You realize, do you not, that if you are found guilty of more than one of those crimes this court can order that the sentences be served consecutively, that is, one after another?

(f) You realize, do you not, that if you represent yourself, you are on your own? I cannot tell you how you should try your case or even advise you as to how to try your case.

(g) Are you familiar with the Federal Rules of Evidence?

(h) You realize, do you not, that the Federal Rules of Evidence govern what evidence may or may

not be introduced at trial and, in representing yourself, you must abide by those rules?

(i) Are you familiar with the Federal Rules of Criminal Procedure?

(j) You realize, do you not, that those rules govern the way in which a criminal action is tried in federal court?

(k) You realize, do you not, that if you decide to take the witness stand, you must present your testimony by asking questions of yourself? You cannot just take the stand and tell your story. You must proceed question by question through your testimony.

(l) (Then say to the defendant something to this effect):

I must advise you that in my opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I would strongly urge you not to try to represent yourself.

(m) Now, in light of the penalty that you might suffer if you are found guilty and in light of all of the difficulties of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?

(n) Is your decision entirely voluntary on your part?

(o) If the answers to the two preceding questions are in the affirmative, [and in your opinion the

waiver of counsel *is* knowing and voluntary.] you should then say something to the following effect:

"I find that the defendant has knowingly and voluntarily waived his right to counsel. I will therefore permit him to represent himself."

(p) You should consider the appointment of standby counsel to assist the defendant and to replace him if the court should determine during trial that the defendant can no longer be permitted to represent himself.

ENGEL, Circuit Judge, concurring. I write separately not to express any disagreement whatever in Judge Jones' fine opinion, but to reinforce it.

It had seemed to me, from a careful review of the record, that this was a case in which defendant McDowell sought not the protection of the constitutional guarantees to the right to counsel and to the right to represent one's self, but instead to manipulate a system designed for his own protection in order to gain advantage from a totally unwarranted and unjust abuse of it. The question before our panel, therefore, was not whether McDowell had in any way, constitutional or otherwise, been dealt with unfairly. He had not. Instead the question was how we might more effectively forestall future recurrences of what has become a rather commonly recurring abuse. I had, and still have, an inborn reluctance to chiseling in marble the very sensible advice which is provided for federal district judges in the *Bench Book for United States District Court Judges*, Third Edition (1986), as reproduced in the Appendix to Judge Jones' opinion. Normally, the *Bench Book* should provide the tools for effective judges and not rules to be obeyed on penalty of reversal. Thus, I would normally oppose the kind of rulemaking engaged in here except for its consummate good sense and usefulness as a tool for avoiding the least useful and productive of all grounds for appellate review: procedural error which can easily be avoided. It is important also to emphasize that the rule today, based upon our supervisory powers, requires substantial compliance and not literal adherence to the guidelines in the *Bench Book*. For example and by way of illustration, it would probably be useful for a judge to inquire as to the extent of any defendant's education and training, and particularly whether he has observed other criminal trials either as a defendant or as a witness. The point is, of course, that the more searching the inquiry at this stage the more likely it is that any decision on the part of the defendant is going to be truly voluntary and equally important that he will not be able to raise that issue later if he does then decide to repre-

sent himself. It is simply a question of taking enough time at the moment to make a meaningful record and thus to avoid the very real dangers of reversal should the defendant not prove himself up to the task of his own self-defense.

In my opinion, Judge Jones has provided, by a very workable standard, a means of protecting the vital constitutional rights involved while avoiding the unjustified manipulation which can otherwise throw a real but unnecessary burden on the criminal justice system. In addition, by exercising the supervisory powers of the court, Judge Jones has made it clear, I believe, that we are not endeavoring to express any constitutional guidelines which might arguably have applicability beyond our own federal system.

APPENDIX B

No. 86-1276

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

APR 27 1987

JOHN P. HEHMAN, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM STEWART McDOWELL,

Defendant-Appellant

ORDER

BEFORE: ENGEL and JONES, Circuit Judges, and EDWARDS, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

4 APR 1987 RECEIVED

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

APPENDIX C

United States of America vs

DEFENDANT: WILLIAM S. McDOWELL

FILED-CLERK U.S. DISTRICT COURT MAR 19

United States District Court for EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

DOCKET NO. 83-CR-90031-01-FL

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (Rev. 5/85)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date

MONTH	DAY	YEAR
03	19	86

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

[X] WITH COUNSEL Charles Grossmann (Stand-By)
(Name of Counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE, [X] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of (Count One) Conspiracy to Counterfeit in violation of 18 USC 371; (Count Two) Willful Failure to Appear in violation of 18 USC 3146(a).

SENTENCE OR PROBATION ORDER

On Count One:
The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years under 4205(a).

Further, the defendant is ordered to pay a committed fine of $5,000.00.

On Count Two: It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for five (5) years under 4205(a).

Further, defendant is ordered to pay a committed fine of $5,000.00.

SPECIAL CONDITIONS OF PROBATION

Sentence imposed on Count Two is to run consecutive to the sentence imposed on Count One.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

STEWART A. NEWBLATT

Date 3/19/86

App. 18a

APPENDIX D

FILED

MAR 16 1987

JOHN P. HEHMAN, C...

United States Court of Appeals

FOR THE SIXTH CIRCUIT

No. 86-1276

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v,

WILLIAM STEWART McDOWELL,

Defendant-Appellant.

Before: ENGEL and JONES, Circuit Judges; and EDWARDS, Senior Circuit Judge.

J U D G M E N T

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

John P. Hehman
Clerk

Issued as Mandate:

COSTS:

Filing fee.....$
Printing.....$

Total.....$

A True Copy.

Attest:

26

Deputy Clerk

THE COURT: Anything further, Mr. Grossmann?

MR. GROSSMANN: Yes, I've got a matter. I want to put on the record, Mr. McDowell has been somewhat ambivalent about whether or not he would like to exercise his statutory right and proceed In propria. When I've talked to him about it, he would only want to do that as long as I could continue as advisory counsel. I have explained to him that he doesn't have an absolute right but that's strongly encouraged by the court and in my experience that you probably would have me continue in any event as advisory counsel.

Further, I would not make that motion unless to waive his right to counsel, in essence, or to exercise his statutory right to proceed on his own, unless I had it designated in writing from him or unless he wanted to state that on the record. And today I think he's willing to indicate which way he would like to proceed on the case, whether he wants to proceed as his own counsel with me as advisory counsel or wants me to continue on as counsel.

THE COURT: Well, let me say this so that there would be no mistake about it. I would, unless given some reason otherwise, would continue to have you appointed as stand-by or consulting counsel. And I would require any motion or conduct of Mr. McDowell to be discussed with you prior to him doing so. In any event, I will tell you, Mr. McDowell, that you have not a statutory right, but as I understand it, a constitutional right

Lightning Recording Service
G-7170 Lennon Road
Swartz Creek, Michigan 48473
(313) 635-3820

to represent yourself. You also have the constitutional right to be represented by a lawyer, and you also have the right to have counsel appointed for you as we have in the event you are indigent. Do you understand those rights?

DEFENDANT McDOWELL: Yeah.

THE COURT: Okay. Have you made a decision as to what you wish to do in this case?

DEFENDANT McDOWELL: Represent myself with his assistance, if you can do that?

THE COURT: All right, you understand that you will not be able to present something to me without going through him first? That's what I said to you a few moments ago, that if he's there as your counsel to consult, then you must consult with him before you present something to me. That's so that he can advise you as to its legality, it's the appropriate form and that it's the appropriate time and the appropriate method of presenting it to me. And also he can at the same time advise you as its likelihood of success or failure. Do you understand that, Mr. McDowell?

DEFENDANT McDOWELL: Uh-huh, yes.

THE COURT: Any reason why I should not grant Mr. McDowell's request in this case in this fashion, Mr. Haviland?

MR. HAVILAND: No, your Honor.

THE COURT: All right, then you may represent yourself subject to Mr. Grossmann remaining your advisory counsel and

Lightning Recording Service
G-7170 Lennon Road
Swartz Creek, Michigan 48473
(313) 635-3820

subject to the restriction that I have indicated, that you must consult with him before submitting anything to me.

Anything further, Mr. Grossmann?

MR. GROSSMANN: No, I have nothing--

DEFENDANT McDOWELL: Yes.

MR. GROSSMANN: Well. As I understand Mr. McDowell has not been able to review transcripts and other evidence he may have in his possession because he hasn't had glasses and he has indicated that the conditions at the jail are such that he has no time alone or time to review the matters. And because of that as I understand it, I think he is requesting an adjournment of the trial date at this point so he would have time to review evidence and properly prepare for trial.

THE COURT: Well, he will have to file that motion in writing in accordance by five o'clock on Friday. And that he will have to make more than the bear allegation. He has had you available, he'll have to support that by an affidavit with regard to what has been available, and what has been done, and what requests he has made of you, and what request you have been unable to answer, etcetera, so that I want to make sure it's absolutely certain that the bear request, bear general statement that the conditions are such and he can't read and, etcetera, it will not be sufficient. You will have to support it with an explanation including what he has requested you to do, what you have been able to do, etcetera. So, he's certainly free to file

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

6.

RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
FILED
OCT 30 1987
JOSEPH F. SPANIOL JR.
CLERK

No. 86-7164

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIAM S. MCDOWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D. C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the district court conducted a sufficient inquiry into the validity of petitioner's waiver of his right to counsel before allowing petitioner to represent himself at trial.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 86-7164

WILLIAM S. MCDOWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-16a) is reported at 814 F.2d 245.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1987, and a petition for rehearing was denied on April 27, 1987. The petition for a writ of certiorari was filed on June 24, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiring to counterfeit, in violation of 18 U.S.C. 371, and bond jumping, in violation of 18 U.S.C. 3146(a) and 3150. He was sentenced to two consecutive five-year terms of imprisonment and fined $10,000. The court of appeals affirmed (Pet. App. 1a-14a).

1. The pertinent facts are summarized in the opinion of the court of appeals (Pet. App. 2a-4a). On June 24, 1983, federal agents arrested petitioner and his wife, Revera Hendrix, in a counterfeiting "sting." That same day, petitioner's retained counsel, Don Poniatowski, visited petitioner at the police station. On June 26, 1983, petitioner and Hendrix were arraigned. Poniatowski's law partner, John Nowak, entered an appearance on petitioner's behalf at the arraignment. Petitioner and Hendrix were released on bond and promptly fled the country. On April 25, 1985, Canadian authorities arrested them in Alberta. They were returned to Michigan, where they were indicted on the instant charges. Id. at 2a.

Petitioner was represented by another retained attorney, Michael Osser, at his subsequent arraignment and detention hearing. At that hearing, petitioner, against the magistrate's advice, made his own motion to dismiss the indictment. On June 20, 1985, Nowak appeared on petitioner's behalf, but he withdrew on July 1, 1985, and Emory Clark then appeared as retained counsel for petitioner. However, at a pretrial motions hearing on August 20, 1985, the court permitted Clark to withdraw as counsel because petitioner was no longer able to pay for his services, and it appointed new counsel, Mr. Bremer, to represent petitioner. Despite Bremer's appointment, petitioner made repeated attempts to act as his own attorney at the motions hearing. Pet. App. 2a-3a. 1/

On August 26, 1985, Bremer informed the court that he could not be prepared for a trial on September 3. Petitioner refused to agree to a postponement and indicated that he was prepared to represent himself at a trial commencing on September 3. Rather than allow petitioner to proceed pro se, however, the district

---

1/ It also was revealed at the hearing that petitioner had retained at least four other attorneys in the United States and Canada in an effort to recover money and property seized by Canadian authorities. Pet. App. 3a.

court permitted Bremer to withdraw and appointed yet another attorney, Charles Grossman, to represent petitioner. Grossman convinced petitioner that a postponement of the trial was in his best interest, and the trial was postponed until a future date, not earlier than November 1, 1985. Pet. App. 3a.

The final pretrial hearing was held on October 23, 1985. Petitioner was still represented by Grossman at that time, and petitioner indicated that he was satisfied with Grossman's services. However, Grossman told the court that petitioner had finally arrived at a decision as to whether he wanted to be represented by appointed counsel or to proceed pro se. Grossman informed the court that he had talked with petitioner about the representation issue and that petitioner would want to represent himself only if Grossman continued as advisory counsel. Grossman further stated that he would not make the requisite motion unless petitioner were willing to state on the record that he wanted to proceed on his own. Pet. App. 20a. The following colloquy then took place (id. at 20a-22a):

> THE COURT: Well, let me say this so that there would be no mistake about it. I would, unless given some reason otherwise, would continue to have you appointed as stand-by or consulting counsel. And I would require any motion or conduct of Mr. McDowell to be discussed with you prior to him doing so. In any event, I will tell you, Mr. McDowell, that you have not a statutory right, but as I understand it, a constitutional right to represent yourself. You also have the constitutional right to be represented by a lawyer, and you also have the right to have counsel appointed for you as we have in the event you are indigent. Do you understand those rights?
>
> DEFENDANT McDOWELL: Yeah.
>
> THE COURT: Okay. Have you made a decision as to what you wish to do in this case?
>
> DEFENDANT McDOWELL: Represent myself with his [Grossman's] assistance, if you can do that?
>
> THE COURT: All right, you understand that you will not be able to present something to me without going through him first? That's what I said to you a few minutes ago, that if he's there as your counsel to consult, then you

> must consult with him before you present something to me. That's so that he can advise you as to its legality, it's the appropriate form and that it's the appropriate time and the appropriate method of presenting it to me. And also he can at that time advise you as its likelihood of success or failure. Do you understand that, Mr. McDowell?
>
> DEFENDANT McDOWELL: Uh-huh, yes.
>
> THE COURT: Any reason why I should not grant Mr. McDowell's request in this case in this fashion, Mr. Haviland [Asst. U.S. Att'y]?
>
> MR. HAVILAND: No, your Honor.
>
> THE COURT: All right, then you may represent yourself subject to Mr. Grossman remaining your advisory counsel and subject to the restriction that I have indicated, that you must consult with him before submitting anything to me.

In preparation for trial, petitioner demanded, received and read the transcripts of the grand jury testimony of witnesses against him, and he used this information in his cross-examination of the government witnesses. Petitioner also called witnesses in his defense and testified on his own behalf, with Grossman conducting the examination. Pet. App. 4a. 2/

2.a. On appeal, petitioner argued that his conviction should be reversed because the district court failed to give him explicit warnings and to make a determination on the record with regard to petitioner's waiver of his right to counsel. In rejecting this argument, the court observed that petitioner "was clearly and repeatedly advised of his right to counsel, and his right to have counsel appointed if necessary, prior to his assertion of his right to self-representation" (id. at 6a); and the court found, on the basis of the record as a whole, that petitioner "understood the dangers and disadvantages of self-representation at the time he made his choice" (id. at 8a).

2/ During the trial, the district court repeatedly had to remind petitioner of the condition that he check with Grossman before proceeding. The court also indicated to petitioner, and to others in petitioner's presence, that he thought petitioner was making a mistake and was "in over his head." Pet. App. 4a.

Nevertheless, in order to avoid future appeals of a similar nature, the court, in the exercise of its supervisory authority, stated that henceforth "whenever a federal district judge in [the Sixth Circuit] is faced with an accused who wishes to represent himself in a criminal proceeding, the model inquiry [set forth in the Bench Book for United States District Judges, 1.02-2 (3d ed. 1986)] or one covering the same points along with an express finding that the accused has made a knowing and voluntary waiver of counsel, shall be made on the record prior to allowing the accused to represent himself" (Pet. App. 8a-9a). 3/

The court of appeals also rejected petitioner's contention that the district court erred in failing to determine whether he was competent to conduct his own defense (Pet. App. 9a-10a). In the court's view, the question of competency should not be considered separately from the question whether the assertion of the right of self-representation was knowing and intelligent, since "[t]he only condition on [the right of self-representation] is that it be asserted by the accused with his 'eyes open'" (id. at 10a (emphasis in original), quoting Faretta v. California, 422 U.S. 806, 835 (1975)). The court further explained that it was not called upon here to decide a "hard case" involving a marginally competent defendant desiring to proceed pro se, because petitioner has a high school education, is literate and fully fluent in English, and has no apparent physical or psychological disability, and that "[n]one of his many attorneys ever suggested that he was, in any sense, incompetent" (ibid.).

Finally, petitioner contended that the district court committed plain error in not declaring a mistrial sua sponte because, petitioner asserted, it became apparent that he was not receiving a fair trial because he was representing himself. The court rejected this argument, relying upon this Court's statement

---

3/ The model inquiry is set forth in the appendix to the court's opinion (Pet. App. 12a-14a).

in Faretta that "'whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of "effective assistance of counsel"'" (Pet. App. 11a, quoting 422 U.S. at 834 n.46).

b. In a concurring opinion, Judge Engel concluded, based on "a careful review of the record, that this was a case in which [petitioner] sought not the protection of the constitutional guarantees to the right to counsel and to the right to represent one's self, but instead to manipulate a system designed for his own protection in order to gain advantage from a totally unwarranted and unjust abuse of it" (Pet. App. 15a). Judge Engel therefore expressed the view that petitioner had not "in any way, constitutional or otherwise, been dealt with unfairly" (ibid.). However, he endorsed the majority's invocation of its supervisory power to assure in future cases that there will be a full record pertaining to the waiver issue (id. at 15a-16a).

ARGUMENT

Petitioner renews his claim that the district court violated his right to counsel in granting his request to represent himself. In particular, petitioner contends that the court failed adequately to inquire into whether he knowingly and intelligently waived his right to counsel. The court of appeals correctly rejected this contention, and its decision presents no issue warranting review by this Court.

1. In Faretta, the Court stated that "[a]lthough a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that he knows what he is doing and his choice is made with eyes open." 422 U.S. at 835, quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942). The Court went on to find that this standard was satisfied in that

case, because "Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel" (422 U.S. at 835); because "[t]he record affirmatively show[ed] that Faretta was literate, competent and understanding, and that he was voluntarily exercising his informed free will" (ibid.); and because "[t]he trial judge had warned Faretta that he thought it was a mistake not to accept the assistance of counsel, and that Faretta would be required to follow all the 'ground rules' of trial procedure" (id. at 835-836).

Each of the factors upon which the Court relied in Faretta in concluding that Faretta was sufficiently aware of the dangers and disadvantages of self-representation is also present here. Before permitting petitioner to represent himself, the district court explicitly informed him that he had a right to be represented by retained counsel or, if he was indigent, by appointed counsel (Pet. App. 20a-21a). Nevertheless, petitioner unequivocally expressed his desire to represent himself (id. at 3a-4a). The district court also made clear that petitioner would be required to follow applicable procedures, and indeed to consult with advisory counsel before raising any issues, and the court thereafter repeatedly indicated to petitioner that he was making a mistake by continuing to proceed on his own (id. at 4a). The court of appeals also specifically found that petitioner was literate and competent (id. at 10a) and that he had "elected to defend himself at trial with his 'eyes open'" (id. at 8a).

It also is significant that petitioner had extensive assistance of counsel before he elected to proceed pro se. He had retained a number of attorneys to assist him, both in connection with the instant charges and on other matters, and he was represented by appointed counsel at the time he elected to represent himself. That attorney informed the court that he had discussed the self-representation issue with petitioner. This

also is not a case in which the defendant's election to proceed pro se left him totally without the assistance of counsel. Consistent with the desire of petitioner and the attorney, the court provided for counsel to continue in the case on a stand-by or advisory basis. Pet. 2a-3a, 20a-22a. Furthermore, the court of appeals found it "clear that [petitioner] was not a stranger to the courts * * * and [that] he was not faced with a situation of enduring representation by counsel he considered ineffective or being forced to proceed immediately as his own," as was true in many of the cases petitioner cited (Pet. App. 8a). Nor was petitioner's decision to represent himself in any sense rash: he had expressed a desire to do so two months earlier, during the August 26, 1985 hearing (id. at 3a), and counsel's statements to the court at the October 23 hearing revealed that petitioner had given the matter considerable thought (id. at 20a).

On this record, the courts below reasonably concluded that petitioner "understood the dangers and disadvantages of self-representation at the time he made his choice" (id. at 8a). Given that understanding and the numerous objective indicia to support it, Faretta did not mandate that the district court nevertheless go through the ritual of a full-blown colloquy on the wisdom of self-representation. 4/

4/ Petitioner's reliance (Pet. 7, 10, 18) on Von Moltke v. Gillies, 332 U.S. 708 (1948), is misplaced. The issue in that case was not whether the petitioner had been adequately warned of the dangers of self-representation; Von Moltke was not a self-representation case. Rather, the issue in Von Moltke was whether the defendant had validly waived his right to counsel and pleaded guilty in reliance upon the erroneous advice of a government agent. Petitioner's reliance (Pet. 12-13) on Justice Marshall's dissent from the denial of certiorari in Raulerson v. Wainwright, 469 U.S. 966 (1984), is also misplaced. Although Justice Marshall discussed the language in Faretta stating that the defendant should be made aware of the dangers and disadvantages of self-representation, the central thesis of the dissent was that the petitioner had been improperly denied his right of self-representation and that "the precautions necessary to protect the right of counsel * * * not be permitted to eviscerate the right of self-representation" (id. at 969).

2. The decisions of other courts of appeals likewise do not support the conclusion that petitioner's Sixth Amendment right to the assistance of counsel was violated. To be sure, several courts of appeals have expressed a preference for, or even mandated, some degree of inquiry on the record, whereby the judge informs the defendant of the risks of self-representation. See e.g., United States v. Hafen, 726 F.2d 21, 25-26 (1st Cir.), cert. denied, 466 U.S. 962 (1984); United States v. Edwards, 716 F.2d 822, 824 (11th Cir. 1983); United States v. Bailey, 675 F.2d 1292, 1297-1302 (D.C. Cir.), cert. denied, 459 U.S. 853 (1982); United States v. Welty, 674 F.2d 185, 192 (3d Cir. 1982); United States v. Kimmel, 672 F.2d 720, 721-722 (9th Cir. 1982); United States v. Trapnell, 638 F.2d 1016, 1029 (7th Cir. 1980); United States v. Tompkins, 623 F.2d 824, 828 (2d Cir. 1980). In fact, in this case, the Sixth Circuit, in the exercise of its supervisory powers, adopted such a requirement to govern future instances of self-representation in the district courts in that Circuit. See Pet. App. 8a-9a. But the other courts of appeals have not required automatic reversal merely because of the failure to conduct such a full-blown hearing; rather, like the Sixth Circuit in this case, they have examined the record, including such inquiry as the district court did make, to determine whether the defendant made an effective waiver of his right to the assistance of counsel. 5/

5/ The Third Circuit has twice reversed a conviction because the district court did not conduct a formal inquiry. However, the circumstances of those cases were quite unlike this case. In United States v. Welty, supra, the defendant was apparently driven to proceed pro se because he was dissatisfied with his assigned counsel and because the district court had denied his motion for substitute counsel (674 F.2d at 189-193), and the court of appeals was particularly disturbed that the trial judge did not ask Welty's court-appointed attorney to serve as "standby counsel" and to help Welty if needed (id. at 193 n. 9). Here, by contrast, petitioner expressed no dissatisfaction with counsel and the district court provided appointed counsel to serve as standby counsel throughout the trial. In Plankhy v. Cuyler, 701 F.2d 728, 730-731 (3d Cir. 1983), the court reversed primarily because the trial judge did not inform Plankhy of his right to have counsel appointed, noting that Plankhy might have availed (Continued)

Here, the court of appeals concluded that the district court's failure to conduct an extensive hearing or specifically to discuss the disadvantages of self-representation did not require reversal because the record showed that petitioner understood the risks of self-representation (id. at 8a). Neither the court's examination of the record to determine if petitioner was denied his Sixth Amendment right to counsel, nor its determination that he was not, conflicts with any decision of another court of appeals. Review of that fact-bound decision therefore is not warranted. 6/

---

himself of appointed counsel instead of representing himself. Id. at 731-732. Here, petitioner was represented by appointed counsel at the time he decided to proceed on his own, and the district court informed petitioner of his right to appointed counsel if he was indigent (Pet. App. 20a-21a).

Likewise, none of the state decisions cited by petitioner holds that the failure to conduct a full-blown hearing requires reversal in every case. As the court stated in one of those decisions, "where no colloquy exists on the record, this court will look to any evidence on the record that shows defendant's actual awareness of the risks of self-representation." City of Bellevue, v. Acrey, 691 P.2d 957, 962 (Wash. 1984).

6/ In his statement of the "Questions Presented For Review" (see Pet. i), petitioner identifies two additional issues: whether the district court should have inquired into his competence to represent himself and whether it should have declared a mistrial sua sponte when it became apparent that he could not represent himself effectively. However, in the argument section of the petition, petitioner mentions those issues only in passing. See Pet. 11. Suffice it to say that the court of appeals correctly concluded that "no degree of legal knowledge is required to knowingly and intelligently demand the right to represent oneself in a criminal proceeding," and that there is no suggestion in this record that petitioner was in any sense incompetent (Pet. App. 10a). As for petitioner's claim that the district court should have declared a mistrial because petitioner did not do an effective job of representing himself, that argument is precluded by Faretta's pronouncement that a defendant who chooses to represent himself may not assert that he received ineffective representation. See 422 U.S. at 834 n.6

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

NOVEMBER 1987

SUPREME COURT OF THE UNITED STATES

WILLIAM STEWART McDOWELL *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 86-7164. Decided December 7, 1987

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

In *Faretta* v. *California*, 422 U. S. 806 (1975), we held that an accused has a right to conduct his own defense. We also stated that, because an accused's election to do so "relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel," a defendant who chooses to proceed *pro se* may be allowed to do so only if he "'knowingly and intelligently' [chooses to] forgo those relinquished benefits." *Id.*, 422 U. S., at 835. We stated that an accused wishing to be tried without counsel "must be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Ibid.*

Since *Faretta*, lower federal and state courts have sought to arrive at the proper balance between allowing an accused to exercise his right of self-representation, and at the same time, insuring that a waiver of a defendant's right to counsel is only made when "knowing and intelligent" and "with eyes open." In this case, for example, after petitioner indicated to the District Court his desire to present his own defense, the trial judge conducted a short colloquy with petitioner before allowing him to proceed *pro se*. On appeal, the Court of Appeals rejected petitioner's claim that this brief exchange with the trial judge was insufficient to establish that he had "knowingly and intelligently" waived his Sixth Amendment right to counsel. The Sixth Circuit concluded that "a fair reading of the record as a whole" established that petitioner

elected to represent himself with "eyes open;" therefore it affirmed petitioner's conviction. 814 F. 2d 245, 249 (CA6 1987). The Court of Appeals, however, in the exercise of its supervisory powers, required district judges in the future to conduct a more detailed inquiry of a defendant—based on the model offered at 1 Bench Book for United States District Judges 1.02-2—1.02-5 (3d ed. 1986)—before allowing an accused to waive his right to counsel, as this petitioner had. 814 F. 2d, at 250–251.

In reaching this decision, the Sixth Circuit followed the approach taken by the District of Columbia Circuit in *United States* v. *Bailey*, 675 F. 2d 1292, 1300–1301 (CADC), cert. denied, 459 U. S. 853 (1982). It also rejected the position of the Third Circuit, which had reversed a conviction on facts similar to these, by interpreting *Faretta* to require a "searching inquiry" with an accused before allowing him to conduct his own defense. *United States* v. *Welty*, 674 F. 2d 185, 188–189 (CA3 1982); *accord Piankhy* v. *Cuyler*, 703 F. 2d 728, 730–731 (CA3 1983). Two other Courts of Appeals have likewise read our decision in *Faretta* as requiring that a trial judge conduct a special "hearing to ensure that the accused understands the dangers and disadvantages of proceeding *pro se*." *United States* v. *Edwards*, 716 F. 2d 822, 824 (CA11 1983); *accord United States* v. *Chaney*, 662 F. 2d 1148, 1152 (CA5 1981).

By contrast, four Courts of Appeals have taken the position that no specific inquiries or special hearings must be conducted before an accused's exercise of his *Faretta* rights will be considered "knowing and intelligent." *United States* v. *Hafen*, 726 F. 2d 21, 26 (CA1), cert. denied, 466 U. S. 962 (1984); *United States* v. *Kimmel*, 672 F. 2d 720, 721–22 (CA9 1982); *United States* v. *Trapnell*, 638 F. 2d 1016, 1029 (CA7 1980); *United States* v. *Tompkins*, 623 F. 2d 824, 828–829 (CA2 1980). This conflict among the Courts of Appeals has now gained the attention of, and been a source of confusion to, the state courts as well. *See, e. g.*, *State* v. *Christensen*,

40 Wash. App. 290, 292–297, 698 P. 2d 1069, 1071–1073 (1985) (discussing the varying applications of *Faretta*).

Because a conflict among the lower courts has emerged concerning the proper application and interpretation of our decision in *Faretta*, I would grant certiorari and address the question presented by this petition.